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No. 93-1724

# In the Supreme Court of the United States

OCTOBER TERM, 1993

CABAZON BAND OF MISSION INDIANS, ET AL., PETITIONERS

*v.*

NATIONAL INDIAN GAMING COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether video pull-tab devices are "electronic facsimiles of games of chance" and therefore constitute class III gaming under the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 14 F.3d 633. The opinion of the district court (Pet. App. B1-B22) is reported at 827 F. Supp. 26.

### JURISDICTION

The judgment of the court of appeals was entered on January 28, 1994. A petition for rehearing was denied on March 28, 1994. Pet. App. C1-C2. The petition for a writ of certiorari was filed on April 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, establishes a framework for the regulation of gambling on Indian land. IGRA divides gambling into three classes. Class I gaming includes certain traditional forms of Indian gaming not at issue here. 25 U.S.C. 2703(6).

Class II gaming includes the traditional "game of chance commonly known as bingo," "which is played for prizes * * * with cards bearing numbers or other designations," in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined," and "in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards." 25 U.S.C. 2703(7)(A). Class II gaming also includes "pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo," as long as those games are "played in the same location" as bingo. *Ibid.* The Act permits "electronic, computer, or other technologic aids" to be used "in connection" with class II games. *Ibid.*

Class III gaming is gaming that does not fall within class I or class II, and includes such traditional casino games as blackjack, roulette, craps, and slot machines. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. By virtue of their express exclusion from class II, class III gaming also includes "electronic or electromechanical facsimiles of any game of chance." 25 U.S.C. 2703(7)(B)(ii).

The question whether a particular form of gaming falls within class II or class III has important regulatory consequences. Indian Tribes may conduct class III gaming only pursuant to a Tribal-State compact, while no compact is required to conduct class II gaming. 25 U.S.C. 2703(7)(A)(i) and (B)(ii). Class II gaming, by contrast, is permitted if,

*inter alia,* it is located in a State "that permits such gaming for any purpose by any person," and "such gaming is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. 2710(b)(1). Class II gaming is subject to regulation by the National Indian Gaming Commission, a federal agency established by IGRA within the Department of the Interior. 25 U.S.C. 2706(b), 2710(b).

IGRA provided a one-year grace period (now expired) during which Tribes were permitted to continue to use class III devices that were legally operating when IGRA was enacted, in order to provide an opportunity for the Tribes concerned to attempt to negotiate a Tribal-State compact. 25 U.S.C. 2703(7)(D). IGRA also contains procedures to facilitate the formation of such compacts. If a Tribe seeks to negotiate a compact and the State either refuses to negotiate or fails to negotiate in good faith, the Tribes may seek relief through a court-appointed mediator. 25 U.S.C. 2710(d)(7) and (8).

Congress enacted IGRA against the backdrop of the Johnson Act, 15 U.S.C. 1171 *et seq.* That Act prohibits the use of any "gambling device" in Indian country. 15 U.S.C. 1175. The term "gambling device" is defined to include a "machine or mechanical device" designed "primarily" for gambling and that, when operated, either delivers money or entitles the player to receive money "as the result of the application of an element of chance." 15 U.S.C. 1171(a)(1) and (2). As noted above, class II gaming is not permitted if it is "specifically prohibited on Indian lands by federal law," 25 U.S.C. 2710(b)(1)(A), which includes the Johnson Act. Class III gaming conducted under a compact with a State, however, is exempt from the prohibitions of the Johnson Act. 25 U.S.C. 2710(d)(1)(B).

IGRA authorizes the National Indian Gaming Commission to issue regulations implementing the Act. 25 U.S.C. 2703(6). Pursuant to that authority, the Commission has

issued interpretive regulations. 25 C.F.R. Pt. 502. Under those regulations, an electronic device qualifies as an "aid" (within the meaning of the definition of class II gaming in 25 U.S.C. 2703(7)(A)(i)) only if it "[i]s not a game of chance but merely assists a player or the playing of a game," and "[i]s readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile." 25 C.F.R. 502.7. An "electronic or electromechanical facsimile" of a game of chance (which is excluded from class II gaming by 25 U.S.C. 2703(7)(B)(ii)) is defined by regulation to mean "any gambling device as defined in [the Johnson Act]." *Id.* at 502.8.

2. This case involves the game of pull-tabs. In the traditional pull-tabs game, players purchase outwardly identical cards from a stack of cards (the deal). Each deal has a predetermined number of winning and losing cards. The player pulls open the tab and finds out if the card is a winner. Pet. App. A5. There is now a video pull-tab game in which a computer selects a "card" from a randomly created "deck" and pulls the "tab" for the player. The "card," "deck" and "tab" are computer-generated images that appear on a video screen. Thus, the game of video pull-tabs replicates all aspects of the traditional paper game. Pet. App. A5.

Petitioners are eight Indian Tribes. They brought suit against the federal agencies and officials responsible for enforcement of IGRA and the Johnson Act (federal respondents). Petitioners sought a declaratory judgment that video pull-tab devices constitute class II gaming under IGRA. Pet. App. A6. In particular, petitioners contended that video pull-tab devices are computer "aids" used "in connection" with the game of pull-tabs and not "electronic facsimiles" of the game of pull-tabs. Fifteen States intervened as defendants (State respondents).[1]

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[1] Petitioners also challenged certain regulations issued by the Commission, but those claims have been abandoned. Pet. App. A6.

The district court issued summary judgment in favor of respondents. Pet. App. B1-B22. The district court held that "[w]ithout any doubt, the video pull-tab games clearly are facsimiles of games of chance and therefore are class III gaming." *Id.* at B15. The court noted that the ordinary meaning of facsimile is "'an exact and detailed copy of something.'" *Ibid.* (quoting *Webster's Third New International Dictionary* 813 (1965)). Because "video pull-tabs exactly replicate the paper version of the game and preserve all the fundamental characteristics of the paper version," the court explained, "the game is an electronic facsimile of the paper game of chance known as pull-tabs." *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A10. It agreed with the district court that the ordinary meaning of the term "facsimile" encompasses electronic games that "exactly replicate the paper version of the game." *Id.* at A7. The court therefore rejected petitioners' argument that only games that differ from the original can be facsimiles. *Id.* at A8. That argument, the court concluded, exceeds the limits of "how far language, written in the formal style of a statute, can be wrenched." *Ibid.* The court explained that "we would no sooner take 'yes' to signify 'no' than we would take 'same' to denote only 'different.' " *Ibid.*

## ARGUMENT

1. Petitioners contend that the court of appeals erred in holding that video pull-tabs devices are class III games. Pet. 15-21. As the court of appeals concluded, however, the Indian Gaming Regulatory Act treats such devices as class III games.

a. Under IGRA, "electronic or electromechanical facsimiles of any game of chance" are specifically excluded

from class II gaming, 25 U.S.C. 2703(7)(B)(ii), and therefore are a form of class III gaming. Because pull-tabs constitute a game of chance, an electronic facsimile of that game is a class III game.

The game petitioners sponsor, video pull-tabs, is one such electronic facsimile. The ordinary meaning of the term "facsimile" is "an exact and detailed copy of something." *Webster's Third New International Dictionary* 813 (1967). Because the video pull-tabs game exactly replicates the traditional paper pull-tabs game, it is an "electronic facsimile" of that traditional game. Thus, as the court of appeals concluded, under the text of IGRA, video pull-tabs constitute a class III game.

Petitioners contend (Pet. 15-16) that video pull-tabs and the traditional paper game are simply different versions of the same class II game and that "[i]t is no more correct to say that the electronic version of the game is a facsimile of the paper version than to claim that the latter is a facsimile of the electronic version." Pet. 15-16. Petitioners' effort to equate the two games is misguided. The paper game came first and the video game copied it. The very name of the game—"pull-tabs"—leaves no doubt about which game is the original and which is the copy. Compare 25 U.S.C. 2703(7)(A)(II) (describing the game "commonly known as bingo" as a game in which the "holder of the card covers" numbers when similarly numbered objects are drawn).

Petitioners next make the related argument that a class II game should be defined entirely by its rules. According to petitioner, if two games have the same fundamental rules, one cannot be a facsimile of the other. Pet. 16-18. If petitioners' view were accepted, however, it would limit class III "facsimiles" to electronic games that have fundamentally different rules from the games they replicate. That construction of the term "facsimile" is implausible. Congress could not have chosen a word that means exactly

the same to signify something that is fundamentally different. As the court of appeals noted, petitioners' argument far exceeds the limits of "how far language, written in the formal style of a statute, may be wrenched." Pet. App. A8.

Petitioners also contend (Pet. 16-18) that a video pull-tabs device should be viewed as an electronic "aid" used in connection with the class II game of pull-tabs. But the ordinary meaning of the term "aid" is "assistance," "support" or "help." *Webster's Third New International Dictionary, supra,* at 44. Those words contemplate that an electronic device will have a limited function, such as performing one feature of a traditional class II game; they do not contemplate that the electronic device will entirely replace the traditional game.

Petitioners' interpretation also ignores the important distinction in IGRA between class II electronic aids and class III electronic facsimiles. The distinction is between technology that enhances traditional bingo parlor games, and technology that effectively transforms a traditional bingo parlor into a casino hall with fast-paced, slot machine-type games. As to the former, Congress was satisfied that the National Indian Gaming Commission could handle any potential abuses. As to the latter, however, Congress concluded that "there is no adequate Federal regulatory system in place" and that therefore "the logical choice is to make use of existing state regulatory systems." S. Rep. No. 446, 100th Cong., 2d Sess. 13 (1988). Accordingly, electronic facsimiles are permitted only pursuant to a Tribal-State compact governing class III gaming. Petitioners' construction of IGRA would undermine that policy judgment. Petitioners' interpretation would convert every class III electronic "facsimile" into a class II electronic "aid," draining the terms "electronic

facsimile" of any operative significance. Congress did not deliberately exclude electronic facsimiles from class II games only to have them reappear as class II electronic aids.[2]

b. The legislative history of IGRA confirms that Congress intended to classify video pull-tabs as class III gaming. For example, in explaining the one-year grace period for the continued use of electronic facsimiles, the Senate Report states that "[t]his transition is provided to enable tribes to enter into compacts for currently operated games *such as video bingo,* bingolet, bingo 21, *and other similar games.*" S. Rep. No. 446, *supra,* at 10 (emphasis added). Similarly, the Report explains that "*[a]ll video machines* and other electronic or electromechanical facsimiles of games of chance may continue to operate for 1 year after the date of enactment of the bill to give tribes the opportunity to negotiate tribal-State compacts to cover the operation of such games." *Id.* at 7 (emphasis added). Those statements show that Congress viewed "all video machine games," including "video bingo" and "similar games" like video pull-tabs, as electronic facsimiles.

In addition, the original version of the bill that ultimately became IGRA expressly included as class II games "electronic or electromechanical facsimiles of [bingo, pull-tabs, tip jars and other similar games], where devices of such types are otherwise legal under State law." 133 Cong. Rec. S2244 (daily ed. Feb. 19, 1987). In the enacted version, however, that language was deleted, and the language excluding electronic facsimiles from class II gaming was added. That change is compelling evidence that

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[2] The Commission's approval of devices that keep track of bingo cards and that determine the number that is "called" in playing that game lend no support to petitioners' position here. Pet. 17. Those devices each help in performing one function of bingo; they are not self-contained video bingo games.

Congress intended to classify electronic versions of games such as pull-tabs as class III gaming.

Petitioners seize upon a portion of the Senate Report explaining that the purpose of authorizing electronic aids was to give Tribes "maximum flexibility" to use modern technology. Pet. 18-19. But as the court of appeals pointed out (Pet. App. A9), the technology cited in the Report was the kind that would link traditional bingo parlors. S. Rep. No. 446, *supra,* at 9. The Report expressly distinguished such technology from self-contained electronic facsimiles. *Ibid.*

c. The relationship between IGRA and the Johnson Act also shows that video pull-tabs constitute a class III game. The Johnson Act prohibits the use of "gambling device[s]" in Indian country, and the definition of gambling devices includes video pull-tabs devices. 15 U.S.C. 1171, 1175. The Johnson Act therefore prohibits the operation of video pull-tabs in Indian Country. IGRA does not repeal the Johnson Act. Instead, it creates a limited exemption for class III gaming conducted pursuant to a Tribal-State compact. 25 U.S.C. 2710(d)(1). Class II gaming remains subject to the Johnson Act. 25 U.S.C. 2710(b)(1)(A); S. Rep. No. 446, *supra,* at 12. Thus, the game of video pull-tabs is permitted under the Johnson Act only if it is a class III game approved under a Tribal-State compact. If it is a class II game, it would be prohibited by the Johnson Act. The only conclusion that makes sense of the statutory scheme is that video pull-tabs and other similar electronic games are class III games.

2. There is no conflict in the circuits on the issue presented here. The only other court of appeals that has considered the meaning of the term "electronic facsimile" is the Ninth Circuit. See *Spokane Indian Tribe* v. *United States,* 972 F.2d 1090 (1992). In that case, the question was the proper classification of Pick Six Lotto—a game in

which a single player picks six numbers and tries to match them against numbers picked by a computer. The Ninth Circuit held that Pick Six Lotto is an electronic facsimile of a game of chance and therefore a class III game. *Id.* at 1093. It reasoned that "[t]he Pick Six game is not merely an electronic aid to enhance the participation of more than one person in the Tribe's Class II gaming activities." *Ibid.* "Rather than broadening potential participation in a bingo-like game," the court concluded, "Pick Six is an electronic facsimile in which a single participant plays against the machine." *Ibid.* That reasoning is consistent with the reasoning of the court of appeals in this case. There accordingly is no need for intervention by this Court to resolve any divergence in the lower courts.

3. Petitioners assert that the decision below will cause economic hardship to Indian Tribes. Pet. 9-14. Congress recognized that the classification of electronic games as class III gaming might cause hardship, and specifically addressed that issued in IGRA itself. Congress provided a one-year grace period for the continued operation of those electronic games that were already operating when IGRA was enacted in 1988. 25 U.S.C. 2703(7)(d). Congress also prescribed procedures to facilitate compacts between Tribes and States to operate class III games if they are otherwise permitted under state law. 25 U.S.C. 2710(d)(7) and (8). If the grandfather protection and compact procedures have proven inadequate, as petitioners suggest (Pet. 6-7 n.2), the answer is for petitioners to return to Congress for new legislation. The answer is not to interpret IGRA in a manner that is inconsistent with Congress's clearly expressed intent.[3]

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[3] Petitioners argue (Pet. 19-21) that the court of appeals erred in failing to apply the principle that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). As the court of appeals concluded, however, Because the meaning of the provisions at issue here is unambiguous, however, that principle is inapplicable. Pet. App. A10.

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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